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No. 79

Supreme Court of the United States

OCTOBER TERM, 1961

[redacted], Petitioners,

v.

[redacted], Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE [redacted]

BRIEF FOR THE RESPONDENTS IN OPPOSITION

[redacted]

[redacted]

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 79

LEHIGH VALLEY COOPERATIVE FARMERS, INC. AND SUN-CREST FARMS, INC., PETITIONERS

v.

UNITED STATES OF AMERICA AND ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 210a) is reported at 183 F. Supp. 80. The opinion of the United States Court of Appeals for the Third Circuit (R. 897) is reported at 287 F. 2d 726.

JURISDICTION

The judgments of the Court of Appeals were entered on February 20, 1961 (R. 907–909). A timely petition for rehearing was denied on March 10, 1961. (R. 909–911.) The petition for a writ of certiorari was filed on April 12, 1961, and granted on June 19,

1961 (R. 911). 366 U.S. 957. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Agricultural Marketing Act of 1937, 7 U.S.C. 601 *et seq.*, authorizes the provisions of the New York-New Jersey Milk Marketing Order No. 27, 7 C.F.R. 927.1 *et seq.*, which require petitioners (milk handlers who do not belong to the marketwide pool established by the order) to make compensatory payments, into a producer-settlement fund, on fluid milk which they dispose of in the marketing area.

2. Whether, having elected, and accepted the benefits of, partial rather than full regulation under the terms of Order No. 27, petitioners are estopped from challenging the validity of an essential feature of that partial regulation.

3. Whether, if the partial regulation of petitioners provided for in Order No. 27 is invalid, petitioners are subject to full regulation under the order.

STATUTE INVOLVED

The relevant provisions of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601 *et seq.*, are set forth in the Appendix, pp. 60–63, *infra*.

STATEMENT

1. THE ECONOMIC AND STATUTORY BACKGROUND

This case presents issues connected with the regulation of the milk industry. As this Court has stated,

such issues are "entwined with * * * factors that call for understanding of the milk industry," [1] the economy of which "is so eccentric that economic controls have been found at once necessary and difficult." [2] The factors which render such regulation imperative have been explained in detail in *Nebbia* v. *New York*, 291 U.S. 502, 516–518, and *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 549–550, and will be dealt with only briefly here.

Since milk is an essential element of diet, and in particular of young infants, the public interest requires a constant, adequate supply of wholesome milk. The demand and supply of milk, however, are subject to sharp variations. Apart from considerable fluctuations in the daily demand for milk, there are seasonal cycles in the supply, as the result of which there is nearly twice as much milk available in June as there is in November. Storage of the excess supply to meet a later peak in demand is not possible because of the highly perishable nature of milk.[3]

Surplus milk, *i.e.*, the milk which exceeds the current demand for fluid milk as a food beverage, can be utilized in the production of butter, cheese, milk powder, and similar items. For those purposes, however, it can be sold only at a greatly reduced price. Consequently, in unregulated markets all pro-

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[1] *United States* v. *Ruzicka*, 329 U.S. 287, 294.

[2] *H. P. Hood & Sons* v. *DuMond*, 336 U.S. 525, 529.

[3] Thus, in order to insure satisfaction of the daily demand, the milk industry must carry a surplus of about 20% (*Nebbia* v. *New York*, 291 U.S. 502, 517); a supply sufficient to meet the needs in November necessitates a surplus of more than 50% during the flush season in June.

ducers compete most eagerly for the more profitable sales of fluid milk. The resulting cut-throat competition readily engenders business practices which jeopardize "the quality and in the end the quantity"[4] of the vital fluid milk supply.

The principal problem therefore is to find a method by which the burden of the surplus milk may be borne equitably by the entire industry, *i.e.*, by all the producers and the handlers (distributors) of the milk. One method designed to achieve this end was first developed by cooperatives. Under this plan, the cooperative would sell its members' milk for a variety of uses and at a variety of prices, place the proceeds into a single fund, and pay each member on an equal basis according to the quantity of milk supplied by him, not according to the purposes for which his particular milk has been used. By this method of "blending" the price, the burden of surplus milk is spread evenly over all the members of the cooperative.[5] The inherent weakness of this system is that an individual dairy farmer who refuses to join the cooperative can profitably escape assuming his share in the surplus milk burden by selling all his milk to a distributor with a high ratio of fluid milk sales at a price lower than the cooperative's price for fluid milk but higher than the blended price received by the cooperative farmers.

State legislation passed during the depression to give statutory sanction to minimum prices was found

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[4] *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 550.

[5] Cf. *Barns* v. *Dairymen's League Co-op. Assn., Inc.*, 220 App. Div. 624, 630 (N.Y.).

to be constitutional in *Nebbia* v. *New York*, 291 U.S. 502. State control of the milk industry, however, had one serious deficiency. Much of the milk consumed in the large metropolitan centers moves in interstate commerce[6] and the States lack the power to regulate the price to producers in other States. *Baldwin* v. *G. A. F. Seelig*, 294 U.S. 511.

To deal with the problem which cooperatives and state regulations had been unable to solve, Congress entered the field—first under the Agricultural Adjustment Act Amendments of 1935, Section 5 (49 Stat. 753), and then under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, which, as amended, is now in effect. 7 U.S.C. 601 *et seq.*[7] The latter Act establishes a system for regulating the marketing of certain agricultural commodities, including milk, insofar as they are in the current of, or affect, interstate or foreign commerce. Its express purpose is to promote and maintain such orderly marketing conditions "as will establish as the prices to farmers, parity prices * * *" and as will avoid

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[6] Only 70% of the milk of the New York City metropolitan area originates in New York State. *Baldwin* v. *G. A. F. Seelig*, 294 U.S. 511, 519. The City of Boston obtains about 90% of its fluid milk from States other than Massachusetts. *H. P. Hood & Sons* v. *DuMond*, 336 U.S. 525, 526.

[7] Shortly after the decision in *Baldwin* v. *G. A. F. Seelig*, 294 U.S. 511, the States of New York, New Jersey, Pennsylvania, Maryland, Massachusetts, Vermont, and Connecticut petitioned the Secretary of Agriculture that he exercise his licensing powers under Section 8(3) of the Agricultural Adjustment Act (48 Stat. 34–35) to regulate milk moving in interstate commerce. See Brief for Appellant, pp. 17–19, in *Noyes* v. *Rock Royal Co-op., Inc.*, October Term, 1938, No. 826.

unreasonable fluctuations in supplies and prices. 7 U.S.C. 602.

The regulatory plan of the statute, described and held constitutional in *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, and *H. P. Hood & Sons* v. *United States*, 307 U.S. 588, authorizes the Secretary of Agriculture to issue regional marketing orders, each order being specially adapted to the conditions of the area in which it is to be effective. 7 U.S.C. 608c(5), (11). The basic function of the orders is to establish minimum use prices and to assure the payment of uniform minimum prices to farmers by "handlers," a term defined as meaning "processors, associations of producers, and others engaged in the handling of * * * " the commodity or product.

To this end, Section 8c(5), 7 U.S.C. 608c(5), *infra*, pp. 60–62, provides that a milk order shall contain one or more of certain terms and conditions specified in the section. These include, *inter alia*, (1) the classifying of milk in accordance with its utilization; (2) the fixing, or providing a method for the fixing, of minimum uniform prices for each use classification which all handlers shall pay; (3) the payment of uniform prices to producers irrespective of the ultimate use of their milk; and (4) the adjustment of the payments by handlers in order that the total sum paid by the handler for milk purchased by him shall not be less than the value of the milk at the use classification prices. The Section also stipulates that there are to be no terms and conditions other than those therein described "except as provided in subsection (7)." In this connection

Subsection (7)(D), *infra*, p. 62, authorizes the inclusion of such auxiliary provisions as are "Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)–(7) of this section and necessary to effectuate the other provisions of such order."

2. MILK MARKETING ORDER NO. 27

The New York-New Jersey Milk Marketing Order (Order No. 27) was promulgated by the Secretary of Agriculture in 1938 to regulate the handling of milk in the New York metropolitan marketing area. 3 F.R. 1945, 1957, 2100, 2102.[8] The scheme of the order was examined by this Court in *United States* v. *Rock Royal Co-op., supra,* and several attacks upon its validity rejected. In the course of its opinion, the Court discussed the milk marketing problem in the area covered by the order, with particular reference to the profitability and perishability of fluid milk, the requirements for sanitation, the surplus which results during low consumption periods because of the amounts needed to fill demands during peak consumption periods, the use of surplus for cream, butter, cheese, milk powder and other relatively nonperishable products, the cut-throat competition, and the need for a fair division of the fluid milk market among producers. In 1957, the order was amended to extend the marketing area to Northern New Jersey

[8] Order No. 27 is a part of a joint federal-state program. It is complementary to the New York State Revised Official Order No. 126 (R. 700a) and New Jersey Revised Official Order No. 57-3.

and certain additional areas in New York. 22 F.R. 4643.

In its original form, the order provided for the classification, pricing and pooling of milk that was approved by the health authorities for sale in the marketing area. *United States* v. *Rock Royal Co-op., supra,* 307 U.S. at 549–550; *Titusville Dairy Products Co.* v. *Brannan,* 176 F. 2d 332, 335 (C.A. 3), certiorari denied, 338 U.S. 905. By extensive amendments to the order made in 1945, however, the plan of regulation was changed. 10 F.R. 6156. As it now stands, the order (7 C.F.R. 927.1 *et seq.*; R. 815a *et seq.*) establishes a marketwide pool and requires the classification, pooling and pricing of all milk delivered by "producers" or associations of producers to "pool plants." The pool plants are, in the main, those establishments which handle milk primarily for the marketing area defined in the order.[9] The term "producer" is defined as "any dairy farmer whose milk is delivered direct from farm to a pool plant." 7 C.F.R. 927.6; R. 820a.

In recognition of the fact that the value of milk is dependent upon the use made of it, the milk received at the pool plants is classified into three basic categories according to its utilization: Class I (fluid milk), Class II (cream), and Class III (milk products, butter, cheese, etc.). 7 C.F.R. 927.37; R. 838a. Pursuant to the order, the receiving pool plant handlers make monthly reports to the Market Administrator as to

[9] The order provides for the designation as pool plants of such establishments for the receiving, handling, or processing of milk or milk products as meet the requirements specified. 7 C.F.R. 927.25–927.29.

the quantity of milk purchased by them which falls into each of the use classes. 7 C.F.R. 927.50; R. 852a. The Administrator determines the "minimum prices" for each use classification (7 C.F.R. 927.40 *et seq.*; R. 841a) and, from these prices, applied to the reported utilization of all handlers each month, he calculates a "uniform" or "blend" price (7 C.F.R. 927.65 *et seq.*; R. 856a) which is the minimum that each pool plant handler must pay to all his producers on all the milk received by the pool plant from the producers. 7 C.F.R. 927.70; R. 859a.[10]

The Market Administrator maintains a fund known as the "Producer Settlement Fund". 7 C.F.R. 927.75; R. 865a. Each pool plant handler whose average uses place his milk in a higher return category than the average for the market must pay into the Producer Settlement Fund the amount by which the use "value" of his milk exceeds the uniform price required to be paid the producers. Each handler whose use "value" of the milk purchased is less than the uniform blend price required to be paid to the producers is entitled to withdraw the amount of the

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[10] The formula underlying the blend price has been described as follows:

"The Market Administrator computes the value of milk used by each pool handler by multiplying the quantity of milk he uses in each class by the class price and adding the results. The values for all handlers are then combined into one total. That amount is decreased or increased by several subtractions or additions * * *. The result is divided by the total quantity of milk that is priced under the regulatory program. The figure thus obtained is the basic or uniform price which must be paid to producers for their milk." *Grant* v. *Benson*, 229 F. 2d 765, 767 (C.A.D.C.), certiorari denied, 350 U.S. 1015.

difference from the Producer Settlement Fund. Thus, while every producer receives a uniform minimum price for the milk he sells regardless of the use made of it by the particular pool plant handlers to whom he sells, the handlers are required to pay varying amounts geared to the uses which they actually make of the milk. 7 C.F.R. 927.79 *et seq.;* R. 866a; *Grant* v. *Benson,* 229 F. 2d 765, 767 (C.A.D.C.).

As noted, this pooling is applicable only with respect to milk delivered by "producers", as defined in the order, to pool plants. It is not applicable with respect to milk which is delivered by "dairy farmers" to "nonpool plants".[11] Accordingly, handlers who operate nonpool plants are not required to pool their milk under the order, or to pay uniform minimum prices to the dairy farmers from whom they purchase or to the producers in the pool. Since 1945 (when the plan of regulation was changed so as to relate primarily to the handling of milk marketed from pool plants, see, *supra,* p. 8), the order has required nonpool handlers disposing of milk in the marketing area to make "compensatory payments" to the Producer Settlement Fund. Over the years, the compensatory payment provisions of the order have been reviewed by the Secretary of Agriculture and, on occasion, amended in some respects after public hearing. See *infra,* pp. 22–23. Insofar as Class I–A milk (*i.e.,* fluid milk) is concerned, the amount of the com-

[11] A "dairy farmer" is any person who produces milk (7 C.F.R. 927.5; R. 820a); a "nonpool plant" is one which operates primarily outside the marketing area—*i.e.,* while it may dispose of some milk in the marketing area it generally handles milk destined for other areas.

pensatory payment is the difference between the Class I-A and the Class III price—in other words, the difference in value between fluid milk and surplus milk.

It is the validity of these provisions for compensatory payments by nonpool plants which is in issue in this litigation. The provisions of the order concerning the classification, pooling and pricing of milk delivered by *producers* to *pool plants,* and the payments by pool plants into the Producer Settlement Fund, are not challenged.

3. THE ADMINISTRATIVE PROCEEDINGS

Petitioners Lehigh Valley Cooperative Farmers, Inc. (Lehigh) and Suncrest Farms, Inc. (Suncrest) operate milk processing plants located, respectively, at Allentown and Bethlehem, Pennsylvania. Both plants distribute milk, in fluid form, in the New York-New Jersey marketing area. While eligible to participate in the marketwide pool as pool plants, which would entail full regulation rather than partial regulation through compensatory payments, they have expressly elected to be treated as nonpool plants (R. 893, 895).[12] Accordingly, they are subject to the com-

[12] Under an August 1, 1957 amendment, a plant with 55% or more of its milk classified as fluid milk had the option of becoming a pool plant rather than a nonpool plant. 7 C.F.R. 927.29(d); R. 831a. Suncrest exercised its option and chose nonpool status. Lehigh changed its operations at about this time so that it did not qualify as a pool plant under the 1957 order (R. 322a).

By amendment effective September 1, 1958, a plant distributing milk in the marketing area and 55% of whose milk is classified as fluid milk automatically is a pool plant and subject to full regulation unless it elects to be a nonpool plant, 23 F.R. 6738; 7 C.F.R. 927.29(d). Under this provision, petitioners elected nonpool status.

pensatory payment provisions of the order with respect to the fluid milk which they ship into the New York-New Jersey area.

On August 1, 1957, petitioners filed petitions with the Secretary of Agriculture, pursuant to Section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 608c(15)(A), alleging that Sections 927.83 and 927.84 of the order (7 C.F.R. 927.83, 927.84; R. 879a, 882a), insofar as they required petitioners to make compensatory payments, were not authorized by the Act (R. 9a–23a, 26a–39a). A hearing was held in October 1957 at which witnesses testified, official notice was taken of various public documents, and there were received in evidence extensive portions of the transcript of the administrative hearing on the basis of which Order No. 27 had been amended on August 1, 1957, so as to extend the milk marketing area (while retaining the compensatory payment provisions previously in effect) (R. 240a–280a; 280a–361a). The Hearing Examiner concluded in his recommended decision in both cases, on the authority of *Kass* v. *Brannan*, 196 F. 2d 791 (C.A. 2), certiorari denied, 344 U.S. 891, that the compensatory payment provisions were invalid (R. 42a–57a, 58a–59a). However, the Judicial Officer, acting on behalf of the Secretary (5 U.S.C. 516b), dismissed the petitions, sustaining the validity of the relevant provisions (R. 86a–116a, 117a–141a).

4. THE JUDICIAL PROCEEDINGS

During the pendency of the administrative proceedings, the United States brought suit against the two

petitioners in the United States District Court for the Eastern District of Pennsylvania, pursuant to Section 8a(6) of the Act, 7 U.S.C. 608a(6), to compel them to comply with the order pending final administrative and judicial disposition of the Section 8c(15) proceedings (R. 165a). The district court entered a temporary injunction directing petitioners to pay the compensatory payments required by Order No. 27 into the registry of the court until termination of the other proceedings, and retained jurisdiction over the cause (R. 189a–193a).

Following the adverse decisions of the Secretary, each of the petitioners filed in the district court a suit for review of the Secretary's ruling, in accordance with Section 8c(15)(B) of the Act, 7 U.S.C. 608c(15)(B), and the two review actions were consolidated with the pending enforcement action. In the district court, as before, petitioners' fundamental contention, based upon *Kass* v. *Brannan,* 196 F. 2d 791 (C.A. 2), certiorari denied, 344 U.S. 891, was that the compensatory payment provisions were invalid in that they violated the "uniformity" requirement in Section 8c(5)(A) of the Act, 7 U.S.C. 608c(5)(A), *infra,* p. 60.

The district court in the instant cases concluded that the compensatory payment provisions were necessary and incidental to the other provisions of the order but, nevertheless, held them to be invalid under the authority of the *Kass* case (R. 210a–231a). On the government's appeal, the Court of Appeals for the Third Circuit reversed, upholding the validity of the challenged provisions (R. 897–906). The court de-

clared that the *Kass* decision had erred in construing Section 8c(5)(A) as requiring that all handlers, pool and nonpool, be guaranteed an equal cost for their milk and that, indeed, such a reading "misconceives the plain language of the section" and, in its effects, "directly conflict[s] with the comprehensive regulatory undertaking of the complete Act as conceived by Congress" (R. 902, 903). Reasoning that Section 8c(5)(A) necessarily has reference only to pool plants, *i.e.*, fully regulated handlers who must pay uniform prices to their producers and account to the Producer Settlement Fund for their utilization of the milk, the court concluded that the section (R. 905–906):

> * * * provides the foundation upon which the Secretary of Agriculture charges the pool handlers in the marketing area with their actual utilization of the milk despite the fact that under Section 8c(5)(B), they pay the producer the uniform blend price. It in no way dictates equalized costs between pool handlers or between pool and nonpool handlers. * * * [I]ts only valid construction is that its application is limited to all pool or fully regulated handlers for the regional marketing area to determine the accountability of those handlers to the pool.

Finally, the court ruled that the compensatory payment provisions were authorized by Section 8c(7)(D) of the Act, 7 U.S.C. 608c(7)(D), *infra*, p. 62, in that they were "incidental to * * * and necessary to effectuate the other provisions" of the order, and ruled further that the formulation of the provisions

was supported by the administrative record (R. 906).[13]

SUMMARY OF ARGUMENT

I

Petitioners complain of the provisions of Order No. 27 requiring them, and other nonpool handlers disposing of fluid milk in the marketing area covered by the order, to make compensatory payments to the Producer Settlement Fund. It is the government's position, upheld by the Court of Appeals, that these provisions are authorized by Section 8c(7)(D) of the Agricultural Marketing Act and, contrary to petitioners' argument, do not conflict with Section 8c(5).

A. Underlying the compensatory payment provisions in Order No. 27 is the necessity—not disputed by petitioners—for a plan of partial regulation with regard to handlers who do only a part of their business in the marketing area and either do not qualify as pool plants or (like petitioners) have elected not to be subject to full regulation as members of the pool. As spelled out by the Secretary of Agriculture in detailed findings (following public hearings with respect to compensatory payments) if left totally unregulated the nonpool handler would have a substantial competitive advantage over the fully regulated pool handlers

[13] In its disposition of the case, the court did not reach the government's alternative contention that, since petitioners elected to be subjected to partial regulation, in the form of the compensatory payments, rather than to full regulation (see p. 11, *supra*), they are estopped from contending that the incidents of that partial regulation are invalid. We are renewing that contention here as an alternative basis for affirmance. See Point II, *infra*, pp. 55–57.

in the sale of fluid milk in the marketing area. This advantage stems partially from the fact that the nonpool handler, unlike the pool handler, is not required by Order No. 27 to pay minimum prices. Additionally, the nonpool handler with a relatively high percentage of fluid milk sales would be able to outbid the pool handler in purchasing milk. This is because, on his sales of fluid milk, the pool handler must make payments into the Producer Settlement Fund and therefore, unlike the nonpool handler, cannot afford to pay his producers much more than the uniform blend price (which is always less than the value of milk destined for use in fluid form). The consequence of the unregulated nonpool handler's advantage would be that nonpool fluid milk sales would displace sales by pool handlers. This would drive down the blend price and severely impair the entire regulatory scheme.

The Secretary considered the various proposals advanced for meeting the problem in the New York-New Jersey marketing area covered by Order No. 27, and selected the provisions for compensatory payments as the only fair and feasible method of partial regulation of the nonpool handler. All of the other solutions offered would have either retained the nonpool handlers' advantage to some degree or would have unduly burdened those handlers. On the other hand, a compensatory payment by the nonpool handler on his fluid milk sales in the pool area—measured by the full difference between the Class I (fluid milk) and the Class III (manufacturing use) prices—has the effect of stabilizing the market and preventing

destructive competition for the fluid milk market. For that differential is precisely the amount which the fully regulated pool handler must pay to the Producer Settlement Fund when he shifts milk from a Class III to a Class I use. This differential, it is true, may put nonpool handlers at a disadvantage in selling fluid milk within the marketing area, but there is no way of putting pool and nonpool operators on a completely equal plane, and the Secretary may properly prefer the pool handlers (and their producers) who are the mainstay of the area's milk supply.

In devising the particular form of regulation, the Secretary has wide latitude. Since neither the necessity for partial regulation of nonpool handlers nor the administrative findings at the foundation of the compensatory payment provisions are disputed, it follows that, absent a conflict with other terms of the Act, the provisions are authorized by Section 8c(7)(D) as "[i]ncidental to * * * and necessary to effectuate" the other provisions of the Act. There is no merit to petitioners' contention, raised for the first time here, that, if it confers such authority, Section 8c(7)(D) represents an unconstitutional delegation of legislative power.

B. Relying upon the majority opinion (Judge Learned Hand dissenting) in *Kass* v. *Brannan*, 196 F. 2d 791 (C.A. 2), certiorari denied, 344 U.S. 891, petitioners urge that the compensatory payment provisions violate the requirement in Section 8c(5)(A) of the Act that "minimum prices for each use classification which all handlers shall pay * * * shall be uniform". Viewing the uniformity requirement as

necessitating that the actual cost of milk to all handlers in the marketing area be the same, the majority in the *Kass* case reasoned that, because of the compensatory payment provisions, the nonpool handler's total cost for milk sold in fluid form will exceed the Class I (fluid milk) price (to which the court equated the pool handler's total cost) whenever he pays the farmer more than a Class III (manufacturing use) price for the milk.

This construction of Section 8c(5)(A) is not only opposed to the consistent administrative interpretation but also, as the court below held, will not withstand analysis.

First, Section 8c(5)(A) is directed to pool handlers alone—those handlers subject to full regulation—and therefore has no application to nonpool handlers who are regulated only to a partial extent. This is seen from the fact that the regulatory plan contemplated by the Act is a regional one (7 U.S.C. 608c(11)(A)), envisaging a coordinated plan for a particular region. If all nonpool handlers in the country were deemed to be "handlers" within the meaning of Section 8c(5)(A)—as petitioners appear to claim—all such operators and their farmers would become members of a nationwide pool and the regional marketing scheme would be destroyed. Further, under any definition which would make petitioners "handlers" for purposes of the Section, petitioners would perforce become subject to the full regulation which they do not want and which might be unduly burdensome to them. This Court has recognized that the statute permits

a differentiation between classes of handlers in the marketing area.

Second, even if not limited to pool handlers, Section 8c(5)(A) does not require more than that all handlers similarly situated be afforded uniform treatment. Here it is conceded that all nonpool handlers have been treated alike, and that all pool handlers are treated alike.

Third, Section 8c(5)(A) does not require the equalization of the actual costs incurred by the handlers to which the Section applies. Rather, its mandate is simply that the *minimum* prices shall be uniform. There is no statutory proscription against a handler paying more than the minimum price and, therefore, incurring a total cost in excess of that of another handler. And, under Order No. 27, the minimum uniform price for each use classification is the same for pool and nonpool handlers.

Fourth, the compensatory payments are made to the Producer Settlement Fund and not to the farmer and, therefore, are not part of "price". Thus, they do not come, in themselves, within the statutory requirement of uniform minimum *prices*. In actuality, however, compensatory payments do operate to insure the price uniformity called for by Section 8c(5)(A), and therefore further the objectives of that provision of the statute.

Petitioners' alternative argument that the compensatory payment provisions prohibit the entry of milk into the marketing area in violation of Section 8c(5)(G) was not presented in the administrative proceedings and is therefore not properly before the

Court. The contentions of the State of Minnesota in its *amicus curiae* brief which are based upon Section 8c(5)(D) are also precluded since they were not raised at any stage of the administrative or judicial proceedings by petitioners. In any event, neither of these Sections provides an obstacle to compensatory payments.

II

Petitioners are estopped to challenge the validity of the compensatory payment provisions. While the Secretary could have subjected petitioners to full regulation, Order No. 27 gave them the option to select partial regulation as nonpool handlers. Having expressly exercised that option, and obtained the benefits of less than full regulation, petitioners waived any claim that the burdens of partial regulation are invalid.

III

If the provisions of Order No. 27 for partial regulation of petitioners through compensatory payments should fail, petitioners would be subject to full regulation and would have to comply with all of the provisions of the order relating to pool handlers. These latter provisions are severable and there is no question that they may be validly applied to petitioners.

ARGUMENT

I

THE COMPENSATORY PAYMENT PROVISIONS OF ORDER NO. 27 ARE VALID

We submit that the Court of Appeals was clearly correct in its conclusion that the challenged compen-

satory payment provisions of Order No. 27 are valid. As we show first, the administrative record gives firm support to the Secretary's determination that these provisions are essential to the effective operation of the entire regulatory scheme and, as such, are authorized by Section 8c(7)(D) of the Agricultural Marketing Agreement Act, 7 U.S.C. 608c(7)(D), *infra*, p. 62, providing for "incidental" terms and conditions "necessary to effectuate" the other provisions of the order. While petitioners have advanced an alternative formula for computation of compensatory payments, their suggestion was expressly considered and rejected as unsuitable and inadequate by the Secretary—to whom Congress entrusted the task of formulating the appropriate regulatory plan.

Second, we show that the compensatory payment provisions are not inconsistent with the uniformity requirements of the minimum class price provision of Section 8c(5)(A) of the Act, 7 U.S.C. 608c(5)(A), *infra*, p. 60. As the court below recognized, the provisions of Section 8c(5)(A) have no application to nonpool handlers or their obligations. In addition, contrary to petitioners' argument, that Section cannot be read as a Congressional mandate that the costs to all handlers distributing milk in the marketing area be equalized. Petitioners' interpretation not only finds no basis in the language of the Section but cannot be reconciled with the statutory scheme or its underlying purpose.

A. THE COMPENSATORY PAYMENT PROVISIONS ARE AUTHORIZED BY SECTION 8C(7)(D) OF THE AGRICULTURAL MARKETING AGREEMENT ACT AS INCIDENTAL TO AND NECESSARY TO EFFECTUATE THE OTHER PROVISIONS OF THE ORDER

Petitioners' attack is upon the provisions contained in the 1957 amendatory Order No. 27 requiring compensatory payments by nonpool handlers disposing of milk in the marketing area. Section 927.83, 7 C.F.R. 927.83; R. 879a.[14] Compensatory payment provisions were part of Order No. 27 prior to 1957. However, petitioners first became subject to compensatory payments under Order No. 27 when, by the 1957 amendments, the marketing area was expanded to include certain parts of New Jersey served by petitioners.

The Secretary of Agriculture has long deemed it essential that there be a plan of partial regulation for handlers who do only a part of their business in the marketing area. Since 1945—when Order No. 27 was amended to relate primarily to the handling of milk marketed from pool plants (see p. 8, *supra*)—this regulation has taken the form of compensatory payments to a Producer Settlement Fund. During the sixteen years since their inception, the compensatory payment provisions have been amended

[14] As we have noted, p. 12, *supra*, petitioners also challenged, in the administrative proceeding, Section 927.84 of the order (R. 882a). That Section deals exclusively with payments (not regarded as compensatory in character) on milk the source of which is not established. The record does not disclose that petitioners have been called upon to make payments under the Section, and we have been advised by the Department of Agriculture that, in fact, they have not been. Further, petitioners do not address themselves in their brief to this Section. For these reasons, it is unnecessary to discuss it here.

on several occasions. See *e.g.*, 11 F.R. 11120. The entire subject of compensatory payments was extensively considered in 1953. Immediately following the decision in *Kass* v. *Brannan,* 196 F. 2d 791 (C.A. 2), certiorari denied, 344 U.S. 891—invalidating the prior compensatory payment provisions of Order No. 27—the Secretary held a protracted public hearing on proposed amendments with respect to compensatory payments (which were adopted). On the basis of that evidence, the Secretary made detailed findings on the problem and its most acceptable solution. 18 F.R. 8444. And, again in 1957, in connection with the amendments of that year, the subject was considered at a public hearing and additional findings made by the Secretary. 22 F.R. 4207; R. 752a–755a.

Petitioners apparently would disregard the 1953 findings.[15] But in view of the fact that, from the standpoint of petitioners' challenge, the compensatory payment provisions in the 1957 amendments were not changed from those of 1953, the Secretary's findings in both years are of equal relevance. And they clearly establish the need for partial regulation of nonpool handlers who sell in the marketing area—a need which petitioners do not appear to dispute—and also the justification for the particular form of regulation which the Secretary has selected.

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[15] Petitioners objected to the introduction into the administrative record on their review proceeding of the administrative record made at the time of the 1953 amendments, which related to the need for and the appropriate rate of compensatory payments (R. 287a, 293a). The basis of their objection was that they were not attacking the provisions for compensatory payments as they existed before 1957.

1. *a.* The Secretary's findings detail the severe adverse effects which leaving nonpool handlers completely unregulated would have on the regulatory scheme within a marketing area. 18 F.R. 8444–8448; 22 F.R. 4179, 4207–4208 (R. 752a–755a). The nub of it is that, if left unregulated, nonpool handlers would have a substantial competitive advantage over the fully regulated pool handlers in the sale of fluid milk in the marketing area, and the activities of the nonpool handlers would tend to destroy the price structure within the area.

The problem arises because, as explained in the Statement, *supra,* pp. 3–4, there is normally more milk supplied to a marketing area than is needed for fluid purposes, and fluid milk brings the highest prices. The regulatory scheme assures that no pool handler gets an undue share of these higher prices for fluid milk, and that competition for the fluid milk share of the market does not injure the industry as a whole within the area. If the nonpool handlers selling milk in the area were left unregulated, they would have a double advantage in making fluid milk sales and would therefore tend to obtain too large a share of this portion of the market, to the detriment of the pool operators and their suppliers. The nonpool handler, unlike the pool handler, is not required by the order to pay minimum prices to his dairy farmers; he can therefore often afford to sell his fluid milk cheaper than the pool handler. This factor, in itself, tends to place nonpool milk at a competitive advantage over pool milk in the marketing area and to aid nonpool sales to displace pool sales. In addi-

tion, the nonpool operator who has a higher ratio of Class I (fluid milk) sales than the average in the pool would be able to outbid the pool operator in purchasing milk because he can afford to pay his farmers a price based on his own utilization of the milk, rather than the blended price which tends to control purchases by pool operators. The pool handler (who is similarly situated) could not afford to pay a high utilization price to his producers, even though he makes many Class I sales, because he must also meet his obligation to make payments into the Producer Settlement Fund for the benefit of all producers.

The result of these two factors is that, as nonpool fluid milk sales in the marketing area displace sales that otherwise would have been made by pool handlers, pool handlers would be compelled to use more of their milk for manufacturing purposes (Class III), thus reducing the uniform blend price to their producers. The effectiveness of the regulatory scheme would be greatly impaired and its purposes frustrated; the return to the farmers selling to pool operators would be lowered and the strong tendency would be for them to break away from pool operations and, in turn, for the injurious conditions of the unregulated era to revive.

The Secretary's solution was to remedy the situation by requiring the nonpool handlers whose interest in the market was tangential,[16] when they sold fluid milk (Class I), to pay a compensatory sum to the Pro-

[16] In most months of the year, a plant which ships more than 25% of its milk for fluid use in the marketing area cannot be a nonpool plant. See 7 C.F.R. 927.29 (a) and (b).

ducer Settlement Fund—in an amount equal to the difference between the Class I and the Class III minimum price—so that the return to the pool producers would not be lowered by these Class I sales by nonpool handlers. The nonpool handler and his farmers (whose sales for the area are normally not their main business) no longer obtain an advantage from being outside the regulatory scheme, and the pool operator and his producers (who are the mainstay of the area's milk supply) are not disadvantaged by the entry of the nonpool operator into the marketing area.

Under Section 927.83 of Order No. 27 (7 C.F.R. 927.83; R. 879a), moreover, no compensatory payments are required "for any month in which the volume of Class III milk used in the computation of the uniform price is less than 15% of the combined volume of the Class I-A and Class II milk used in such compuation * * *". Unlike the provisions in effect at the time of the *Kass* case (*supra,* pp. 12, 13–14, 23, *infra,* pp. 34*ff*), the provisions here under attack provide for compensatory payments only when there is a displacement of pool milk by nonpool milk. When there is a shortage of Class I milk in the pool, the compensatory payments are not required. Thus, the payments involved in this litigation are compensatory and are not in the nature of a penalty.

b. The record also reflects that the Secretary gave careful consideration to the various proposals advanced at the rule-making hearings for meeting this problem and, for the reasons developed in his findings, selected the present provisions as the only fair and feasible solution. 18 F.R. 8449–8450; 22 F.R. 4207–

4208; R. 752a–755a. For example, the Secretary rejected the alternative of mandatory full regulation of nonpool handlers in petitioners' situation [17] on the ground that such regulation would be likely to burden them unduly and place them at a substantial competitive disadvantage with regard to other nonpool handlers in the sale of milk in unregulated areas. 22 F.R. 4207–4208; R. 753a–754a.

Similarly, the Secretary expressly considered petitioners' suggestion, advanced in the petition for certiorari (p. 16), that the formula for computing compensatory payments should be based on the actual cost of the milk to nonpool handlers, rather than on the class minimum prices. For reasons developed at length in the findings, this was found not to be a suitable or adequate measure. 18 F.R. 8449. A basic objection to such a formula is that it would enable nonpool plants—which, in the milkshed supplying the New York-New Jersey market, operate side by side with pool plants—to outbid pool plants in buying milk, and thus to give an advantage to farmers supplying nonpool operators. That effect is most evident in the case of a handler who pays his farmers on the basis of an individual handler pool (as do handlers, like Lehigh, subject to the Philadelphia marketing order)—*i.e.*, a blend price based on the particular handler's own utilization, not on the average of all handlers' utilizations. Such a handler could account to his own farmers at the full Class I

[17] Such full regulation has been held permissible. *Tituscille Dairy Products Co.* v. *Brannan*, 176 F. 2d 332 (C.A. 3), certiorari denied, 338 U.S. 905. See *infra*, pp. 57–59.

price for any fluid milk sold in the New York-New Jersey marketing area and thereby avoid making compensatory payments to the New York-New Jersey fund. By availing himself of the New York-New Jersey market to increase his percentage of fluid milk sales above the average of the marketwide pool, he could thus increase the payments to his own farmers (based on his own uses) above the uniform blend price paid producers supplying pool plants (based on marketwide pool utilization). His farmers would gain and maintain an advantage over the farmers whose main business is supplying the New York-New Jersey area.

Necessarily, "[t]he system of compensation payments [in the various Federal milk marketing orders] varies * * * with the local economic circumstances." *Study of the Dairy Industry,* Hearings before the Subcommittee on Dairy Products of the Committee on Agriculture, House of Representatives, 84th Cong., 1st Sess., p. 63. Thus, under other conditions, different provisions might suffice to prevent nonpool handlers from having an undue competitive advantage. For example, where, in less complex milksheds, pool and nonpool handlers are geographically separated and are not in competition for farmers, the ability of nonpool handlers to pay their farmers more than pool handlers may be less significant. Because of differences of that kind, a particular provision—*e.g.,* permitting nonpool handlers to account to their farmers on an individual pool basis and account to the marketwide pool only for any difference—may be appropriate for some areas but

not for others. See *e.g.*, the order for upstate Michigan, 7 C.F.R., Part 916, § 916.84.

The concern of the Secretary here, of course, was confined to the conditions prevailing in the New York-New Jersey marketing area. On the basis of those conditions, he concluded that the only compensatory payment that can avoid the problem presented by the disposition of nonpool milk in the marketing area is one measured by the full difference between the Class III and Class I prices. That difference is exactly the additional amount for which a fully regulated pool handler must account to the Producer Settlement Fund whenever he shifts milk from a Class III use to a Class I use. It is largely that aspect of the order—the handler's accountability to the fund is always greater by the Class III-Class I differential when he sells milk for Class I uses than when he sells it for Class III uses—that stabilizes the market and prevents destructive competition for the Class I market. Unless the nonpool handler is faced with the same cost differential in choosing between Class III sales and Class I sales in the marketing area, he has an incentive to undercut the market, if necessary, in order to convert his otherwise Class III sales into Class I sales.

It is true that the compensatory payment requirement may very well work to the disadvantage of the nonpool operator in selling fluid milk within the marketing area—for any milk purchased at more than the Class III minimum price his total cost will be more than the Class I minimum price—but, as the

Secretary found, there is no workable means of putting pool and nonpool operators on a plane of absolute equality. It is the pool operator and his producer who produce primarily for the marketing area, and when a choice has to be made it is not unfair to protect them as against the nonpool operator and his farmers whose interests in the marketing area are normally peripheral.

2. *a.* In light of the findings of the Secretary—which petitioners do not (and cannot) challenge as lacking support in the evidence adduced at the hearings—the courts below were clearly correct in their conclusion that, absent a conflict with other terms of the Act, the compensatory payment provisions are authorized by Section 8c(7)(D) of the Act, 7 U.S.C. 608c(7)(D) (App., *infra*, p. 62) as "[i]ncidental to * * * and necessary to effectuate the other provisions" of the order. See also *Lawson Milk Co.* v. *Benson*, 187 F. Supp. 66, 72–73 (N.D. Ohio). Indeed, the conclusion below would be required even if it could be said (contrary to the Secretary's determination) that one or more of the alternative proposals would also have been adequate and suitable.

In devising the particular form of regulation, the Secretary necessarily has wide discretion. "A variety of plans * * * may well conform to the statutory standards. But the choice among permissive plans is necessarily the Secretary's; he is the agency entrusted by Congress to make the choice." *Secretary of Agriculture* v. *Central Roig Co.*, 338 U.S. 604, 614. See also *Stark* v. *Wickard*, 321 U.S. 288, 310; *Mitchell* v. *Budd*, 350 U.S. 473, 480; *Queensboro Farm Prod-*

ucts v. *Wickard,* 137 F. 2d 969, 977 (C.A. 2). Given the necessity of some partial regulation of nonpool handlers, no objection can be made that the plan adopted is not essential to the effective operation of the entire regulatory scheme simply because the Secretary could have selected other means— so long as the plan selected is fair and does not contravene other parts of the Act.

b. The "other provisions" of the order to which the compensatory payment is "incidental" and which it is "necessary to effectuate" are those establishing the pool system and the Producer's Settlement Fund. As petitioners admit, those provisions of Order No. 27 are fully authorized by Sections 8c(5) (A), (B), and (C), of the Act, *infra,* pp. 60–61. Paragraphs (A), (B), and (C) are interrelated parts of the statutory scheme, and together provide the authority for the establishment of milk pools: (A) provides for the payment by handlers of the prescribed minimum prices for their actual utilization of milk (*i.e.,* the "use" price); (B) provides for the payment to producers of a uniform price regardless of use (*i.e.,* the "blend" price); and (C) authorizes the establishment of the equalization fund needed to effect the accountings required by (A) and (B) (*i.e.,* the Producer Settlement Fund). Since this statutory scheme of regulation contemplates a market-wide pool, devices which are useful in maintaining the pool in proper working order are authorized by Section 8c(7)(D). The compensatory payment is just such a device. See, also, *infra,* pp. 49–52.

c. Contrary to petitioners' contentions (Br. 43–47), this Court's decisions in *Brannan* v. *Stark,* 342 U.S. 451, and *United States* v. *Rock Royal Co-op.,* 307 U.S. 533, do not call for a different conclusion. In *Brannan* v. *Stark, supra,* the Court held that the Act did not authorize provisions permitting deductions from the Producer Settlement Fund for payments to producers' cooperatives. The Court found that such deductions were not justified by the record, and pointed out further that Congress had expressly limited deductions in Section 8c(5). In contrast, the compensatory payments in issue here are, as we have shown, justified by the record. Cf. *Grant* v. *Benson, supra.* Moreover, the payments represent a form of partial regulation not expressly authorized or prohibited by the basic authorizing provisions of Section 8c(5), yet both "incidental" and "necessary" to the effectiveness of the basic scheme and within the contemplation of Section 8c(7)(D). The decision in *United States* v. *Rock Royal Co-op.,* 307 U.S. at 575–576, in which this Court stated that, "[w]hile considerable flexibility is provided by § 8c(7)(D), it gives opportunity only to include provisions auxiliary to those definitely specified," similarly gives no support to petitioners. The compensatory payment provisions are, as we have shown, auxiliary to the minimum price and pool provisions specified in the Act.

d. Petitioners also contend (Br. p. 47) that, if it authorizes the compensatory payment provisions, Section 8c(7)(D) embodies an unconstitutional delegation of legislative power. This contention was not raised in the courts below and, accordingly, is not

properly before this Court. In any event, it is without merit.

In discussing the delegation of authority to the Secretary in the Act, this Court, in *Rock Royal,* found no constitutional difficulty with the "opportunity" given him in Section 8c(7)(D) "to include provisions auxiliary to those definitely specified" in Section 8c(5). As it noted at an earlier point in the opinion (307 U.S. at 574):

> From the earliest days the Congress has been compelled to leave to the administrative officers of the government authority to determine facts which were to put legislation into effect and the details of regulations which would implement the more general enactments. It is well settled, therefore, that it is no argument against the constitutionality of an act to say that it delegates broad powers to executives to determine the details of any legislative scheme. This necessary authority has never been denied. In dealing with legislation involving questions of economic adjustment, each enactment must be considered to determine whether it states the purpose which the Congress seeks to accomplish and the standards by which that purpose is to be worked out with sufficient exactness to enable those affected to understand these limits. Within these tests the Congress needs specify only so far as is reasonably practicable. The present Act, we believe, satisfies these tests.

As we have stressed, the compensatory payment provisions are "auxiliary" to the provisions specified by Section 8c(5). Applying the "necessary to effectuate" standard of Section 8c(7)(D), the Secretary has

found that these provisions are essential to the effective operation of the entire regulatory scheme. The standard is as specific as "is reasonably practicable" and it was properly applied.

B. THE COMPENSATORY PAYMENT PROVISIONS ARE FULLY CONSISTENT WITH SECTION 8c(5) OF THE ACT

The central point of petitioners' attack upon the compensatory payment provisions is the requirement in Section 8c(5)(A) that "minimum prices for each such use classification which all handlers shall pay * * * shall be uniform as to all handlers." App., *infra*, p. 60. While petitioners admit (Br. p. 16) that nonpool plants are subject to regulation, and do not challenge the adverse effect of sales of fluid milk by nonpool handlers in the marketing area covered by Order No. 27, they nevertheless insist that this uniformity requirement precluded the Secretary from adopting the only plan of partial regulation which he found to be acceptable. As petitioners read the Act, Congress drastically restricted the ability of the Secretary to ameliorate the disorderly marketing conditions which prompted the enactment of the statute.

Petitioners rely mainly on the Second Circuit's decision (Judge Learned Hand dissenting) in *Kass* v. *Brannan*, 196 F. 2d 791, certiorari denied, 344 U.S. 891, in which it was held that the then compensatory payment provisions of Order No. 27 were in violation of the Act. The majority viewed the requirement of Section 8c(5)(A) that minimum prices be uniform as, in effect, necessitating that the actual *cost* of milk to all handlers distributing in the marketing area be

the same. The court reasoned that, under the provisions for compensatory payments, a nonpool handler would have higher costs than a pool handler because the latter's cost is equal to the class price of the milk while a nonpool handler's cost consists of both the amount paid to the dairy farmer and the amount of the compensatory payment. Since the compensatory payment is the difference between Class I and Class III prices, the nonpool handler's total cost exceeds the Class I price for fluid milk whenever he pays the farmer more than a Class III price for milk.

This view of Section 8c(5)(A) is, of course, directly opposed to the long-standing interpretation of the Section by the official charged with its administration, an interpretation which is entitled to great weight. *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84, 90; *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 315; *United States* v. *American Trucking Associations*, 310 U.S. 534, 549.[18] Further, as the court below perceived, the

[18] It is worthy of note that the administrative practice of including compensatory payment provisions in milk orders was fully explained to Congress. *Study of the Dairy Industry*, Hearings before the Subcommittee on Dairy Products of the Committee on Agriculture, House of Representatives, 84th Cong., 1st Sess., pp. 1–31. While the hearings occurred after *Kass* v. *Brannan* was decided, it was made clear to the subcommittee that compensatory payment provisions were being continued in milk marketing orders. *Id.* at pp. 31, 63, 65, 67 *et seq.* Neither at that time nor subsequently was there any legislative suggestion that the provisions should be deleted.

reasoning of the majority in the *Kass* case, urged by petitioners here, will not withstand analysis.[19]

1. *Section 8c(5)(A) applies only to pool plants and is inapplicable to nonpool plants*

The first premise upon which petitioners necessarily proceed is that Section 8c(5)(A) and its uniformity requirement apply to pool and nonpool handlers alike. This premise was rejected—we think correctly—by the court below, as well as in *Lawson Milk Co.* v. *Benson,* 187 F. Supp. 66 (N.D. Ohio), now pending on appeal to the Court of Appeals for the Sixth Circuit.[20]

a. Order No. 27 establishes a regional marketing area, sets up a pool for the area, and designates who are within the area and pool—*i.e.,* the pool handlers and the "producers". Additionally, the order defines the term "producer" as "any dairy farmer whose milk is delivered direct from farm to a pool plant."

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[19] While perhaps not directly pertinent to the present case, it might be mentioned in passing that, even if the *Kass* analysis of the uniformity requirement in Section 8c(5)(A) were correct, the *result* in that case would still be erroneous. As the court below pointed out (R. 903, n. 5), *Kass* involved sales from one handler to another, while Section 8c(5)(A) is limited to handler-producer transactions. In these circumstances, there was no warrant for the Second Circuit's undertaking to construe the uniformity requirements.

[20] In *Lawson*, the district court held that compensatory payment provisions in the Cleveland milk order like those here involved were valid, expressing its disagreement with *Kass*. As noted in our memorandum in connection with the petition for certiorari in the present case (p. 21), the Sixth Circuit has stayed proceedings on the appeal pending the outcome of this case.

See p. 8, *supra*. Under this definition, nonpool handlers do not purchase their milk from "producers," and the requirement of Section 8c(5)(A) that the minimum prices "for milk purchased from producers or associations of producers" be uniform is in terms of the order inapplicable to them. Further, as it is only with respect to the milk of "producers" that minimum prices must be paid under the order, nonpool handlers have no obligation to pay minimum prices.

This pattern of the order follows the statutory prescriptions and accords with their provisions. The regulatory plan contemplated by the Act is a regional one. Section 8c(11)(A), 7 U.S.C. 608c(11)(A), *infra*, pp. 62–63, provides for marketing orders limited to regional production or marketing areas. Section 8c (11)(C), 7 U.S.C. 608c(11)(C), *infra*, p. 63, authorizes different terms for the different production areas and marketing areas. Section 8c(5)(G), 7 U.S.C. 608c(5)(G), *infra*, p. 62, also contemplates separate marketing areas. For its part, Section 8c(5) as a whole provides the method for implementing the marketing of milk in the regional marketing area, by means of a milk pool, and applies, therefore, to those belonging to the pool in the designated area.

It was this factor of regional marketing that led to the conclusion of the court below that Section 8c(5)(A) was directed to pool handlers only and that the Secretary appropriately defined "producers"

in terms of those farmers delivering their milk direct to pool plants. As the court observed (R. 905–906):

> This establishment of the Act on a regional marketing basis necessitates differentiation between pool and non-pool handlers. The Secretary of Agriculture following the letter and spirit of the statute has implemented this concept. He has conducted hearings and investigations to determine the need in certain regions for Milk Marketing Orders, and where called for has promulgated them. The pool handlers under those Orders are subject to full regulation. They must report to the Market Administrator in the region, must pay the uniform blend price to producers and must account to the Producers Settlement Fund for their actual ultilization of the Milk. The non-pool handlers are not subject to full regulation, are not required to pay the uniform blend price to their producers and do not have to account to the Producers Settlement Fund for their ultilization of the Milk. Absent the compensatory payments, they are unfettered as to price, market and amount of distribution.
>
> The aim of Section 8c(5)(A) in this control pattern is certain. It provides the foundation upon which the Secretary of Agriculture charges the pool handlers in the marketing area with their actual utilization of the milk despite the fact that under Section 8c(5)(B), they pay the producer the uniform blend price. It in no way dictates equalized costs between pool handlers or between pool and non-pool handlers. This provision, coupled with the Producers Settlement Fund provides part of the mechanism to achieve the ultimate goal of the Act,

> stabilizing the producers market on the regional level. Consonant with that salutary, carefully wrought design, its only valid construction is that its application is limited to all pool or fully regulated handlers for the regional marketing area to determine the accountability of those handlers to the pool.

In short, the Congressional mandate in Section 8c (5)(A) that the minimum prices to be paid by handlers must be uniform was designed to apply within a regional marketing area only to the extent that the area was fully regulated under the statute and only to those handlers who were fully regulated. Operators not within the plan of regulation, but only peripherally affected, were not to be within the statutory provision.

b. Our position is fortified by a consideration of the consequences that would flow from regarding petitioners as "handlers" purchasing from "producers", within the meaning of Section 8c(5)(A). The result would be either to destroy the regional character of milk regulation or to compel the Secretary to include all operators, including those like petitioners, within the full plan of regulation for a regional marketing area.

If "producer" means all dairy farmers in the country (as petitioners seem to suggest, (Br. p. 39)), not only petitioners but every other handler in the United States would be a "handler" purchasing from a "producer". Under that view, the uniform minimum price (and other) provisions of Section 8c(5)(A) would come into operation for all the farmers

and all the handlers throughout the country, wherever milk was purchased and wherever it was marketed. The result would be that the uniform minimum price would necessarily have to have a nation-wide coverage—since the price has to be uniform for "all handlers"—and there would have to be a nation-wide pool, rather than regional ones. There would no longer be the regional marketing areas called for by Section 8c (11) of the Act and no possibility of setting different prices for the use classifications in the different areas or different blend prices for the producers in each area pool.

On the other hand, if "producer" were read as applying to all farmers (whether they sell to pool plants or not) selling to handlers who dispose of milk in the marketing area, petitioners (and all similarly situated handlers) would likewise be obligated to comply with the provisions of Section 8c(5)(A) and pay, to all of the dairy farmers who supply them, the uniform blend price provided for in Section 8c (5)(B), *infra*, pp. 60–61. This would make petitioners and their farmers an integral part of the pool. Pool membership, and the full regulation which goes with it, is, however, precisely what petitioners sought to avoid when they elected not to be pool plants.

In short, the Secretary's definition of "producer" in Order No. 27 (under which petitioners are not "handlers" for the purposes of 8c(5)(A)) both preserves the regional marketing scheme and enables petitioners to escape the full regulation which they do not want and which the Secretary found might be unduly burdensome to handlers in petitioners'

situation. See p. 27, *supra*. The broader definitions, which would include nonpool handlers within the scope of 8c(5)(A), would fail in this respect. Judge Learned Hand recognized this factor in his dissent in the *Kass* case (196 F. 2d at 800):

> The provisions in suit can indeed be deemed "inconsistent" with this [§ 8c(5)(B) of the Act], if one reads "all producers" to include "non-pool" producers, for the differential is not paid to the "non-pool" producers; and indeed, even if it were, it would not make the price paid to such a producer the same price as that paid to other producers. However, it is apparent that such producers were not intended, for if they were, "non-pool" producers whose milk came into competition with a "pool" would be automatically included in the "pool".[21]

c. It does not run counter to the general scheme of the Act to interpret it as permitting such differentiation among dairy farmers supplying milk to a marketing area, and among different classes of operators in that area. This Court has acknowledged that the Act permits the Secretary to differentiate among dairy farmers. *H. P. Hood & Sons* v. *United States*, 307 U.S. 588, 597–599. And in *Bailey Farms Dairy Co.* v. *Anderson*, 157 F. 2d 87, 92–93 (C.A. 8), certiorari denied, 329 U.S. 788, the court approved the regulation of milk marketing based on separate

[21] In another context, this Court has rejected an overly literal reading of the statute which would lead to an absurd result or frustrate the policy and plan of the Act. See *United States* v. *Rock Royal Co-op.*, *supra*, 307 U.S. at 580 ("purchased" construed to mean "acquired for marketing").

groupings of "producers" and upheld provisions designed to encourage the use of locally produced milk in preference to milk from outside "producers." It is also significant that, in the *Rock Royal* case, the Court upheld Order No. 27 against an attack based on the fact that handlers who sold some of their milk in the New York area were subject to a uniform price for that milk, but not on the milk sold outside the marketing area. The Court found nothing objectionable in this treatment despite the result that for this class of handlers the total costs for milk and the average prices for the separate classes of milk were different from those of other milk handlers who sold in the marketing area.

There is, we think, a strong analogy between the nonpool milk involved here and the unpriced milk in *Rock Royal*. The nonpool milk is unpriced in terms of the Order's provisions for pooling and pricing of pool milk.[22] Just as the "priced" milk in *Rock Royal* was treated differently from the "unpriced" milk, so here the "pool" and "nonpool" milk may receive separate treatment. In *Rock Royal,* this result was reached even though the same handler sold both the priced and unpriced milk and even though his total costs were different from those of other handlers who were required to include all their milk under the order. The Court did not find that the statute required uniformity of prices or costs between

[22] That the nonpool milk may be in another pool, in another area, as that of Lehigh, under Philadelphia Order No. 61, does not affect its status as nonpool milk in the New York-New Jersey area.

the handlers who sold all their milk in the area and those who sold only some milk in the area. There is no reason why it should find otherwise, in the comparable circumstances here.

d. We submit that the matter comes down to this. Petitioners concede (Br. p. 42) that nonpool plants are not wholly excluded from regulation or supervision. If subject to regulation, they must be treated the same as pool plants or differently. If not permitted to be treated differently, as petitioners claim, it follows that they must be treated the same, which means that they must be fully regulated as pool plants. But petitioners do not wish to become pool plants and do not seek uniform treatment with pool plants. They have chosen to be nonpool plants (R. 893, 895) because, apparently, nonpool status is more advantageous to them than pool status (R. 273a–276a). They are not being harmed or discriminated against but are benefited by being subject to the compensatory payments rather than to full regulation; and the compensatory payment device has a rational basis consonant with the statutory plan. Petitioners' claim that pool handlers are favored over nonpool handlers, in violation of the uniformity requirements of Section 8c(5)(A), is thus shown to be without merit on petitioners' own assumptions.

2. *If Section 8c(5)(A) applies to nonpool plants, it requires only uniformity among handlers in the same situation*

As shown above, the phrase "all handlers" in Section 8c(5) does not mean "all handlers in the country" or "all handlers selling in the marketing area";

that reading would destroy the entire scheme of regional marketing areas or else render petitioners full members of the pool subject to full regulation. For that reason, we believe (as argued immediately above) that the uniformity requirement in Section 8c(5) affects only pool plants. If not limited to pool members, however, the uniformity requirement must refer to all handlers *who occupy the same position.* Uniformity is normally observed by proper classification, under which the rule applies to all persons similarly situated. *Fernandez* v. *Wiener,* 326 U.S. 340, 359–360; *Patton* v. *Brady,* 184 U.S. 608, 622–623. See also, *Nicol* v. *Ames,* 173 U.S. 509, 521, where this Court said: "If the classification be proper and legal, then there is the requisite uniformity in that respect."

There is no claim that nonpool handlers have been subjected to diverse treatment or prices, or that pool handlers have not been treated uniformly. In fact, petitioners admit (Br. p. 18) that all handlers *similarly situated* are treated alike. Accordingly, whatever uniformity is required under Section 8c(5)(A) has been accorded to all handlers. Cf. *Green Valley Creamery* v. *United States,* 108 F. 2d 342 (C.A. 1), where the court upheld, against an attack based upon the uniformity requirement of Section 8c(5)(A), provisions of a milk marketing order which established two sets of minimum prices, one applicable where the purchase was from an association of produc-

ers and the other controlling purchases from producers who were not members of an association.[23]

3. *Section 8c(5)(A) prescribes minimum prices rather than equal prices or costs*

Petitioners, and the Second Circuit in the *Kass* opinion, also proceed on the premise that, as to the handlers to which it applies, Section 8c(5)(A) requires the equalization of the actual *costs* incurred by them for their milk. This postulate is likewise unsound.

In the requirement in Section 8c(5)(A) that "[S]uch prices shall be uniform as to all handlers", the word "such" refers to the preceding words, "*minimum* prices for each such use classification which all handlers shall pay". (Emphasis added.) Petitioners appear to overlook the fact that a minimum price sets a *floor* but not a *ceiling* and that minimum is not the equivalent of "equal" or "same". There is no statutory proscription against a handler paying more than the minimum price. See *Stark* v. *Wickard*, 321 U.S. 288, 291: "[T]he Act * * * does not forbid sales [by producers to handlers] at prices above the minimum." Handlers in the pool may well pay more than the blend price to their producers (R 786a *et seq.*) but their payments into, or withdrawals from, the Producer Settlement Fund are computed, nevertheless, on the basis of the difference between the minimum use classification price and the blend price.

[23] See also, *Adams* v. *Milwaukee*, 228 U.S. 572, where this Court upheld a regulatory scheme which accorded different treatment to milk shipped into the city than was accorded to milk drawn from cows within the city.

If one pool handler may thus have a higher *cost* than another pool handler without violating the requirement for *minimum uniform prices* for use classifications and a uniform price to the producers, it follows, *a fortiori*, that a nonpool handler may also have a higher cost than a pool handler without such a violation.

In actual fact, nonpool handlers' costs cannot be equalized to pool handlers' costs since the latter are so disparate. Costs of milk vary depending on the demand, supply, season, bargaining power of the handler, and other factors. The objective of the Act is to fix *minimum prices* for the sale of milk by producers, to be effected by fixing a uniform blend price for the producers in the pool for a designated area. The Act does not require equal *costs* to handlers; there is no reference at all in Section 8c(5) to the "cost" to handlers.

Further, the minimum uniform price, provided in Section 8c(5)(A), refers to the price for each use classification. There is no complaint by petitioners that the use classification price employed for pool handlers was different for nonpool handlers.[24] The attack is levelled instead against the method of application of the use classification price in determining the amount of compensatory payments. What petitioners object to is the fact that the nonpool

[24] Of course, the requirement for uniformity of price does not apply to compensatory payments into the Producer Settlement Fund nor, indeed, to any payments into the fund. Even the payments of pool handlers into the Fund differ, depending on their uses of the milk.

handler is not credited with his actual cost (because the Secretary found that the allowance of such a credit would not protect the marketing area or the minimum price to producers in the pool, see pp. 27–28, *supra*). But since the use classification prices remain uniform and the statute is silent as to equalization of costs, there has been no violation of Section 8c(5).

On the question of uniformity of costs, this Court has already observed that there is no requirement for a uniform price for each unit of milk purchased by a handler nor for uniformity of the average price each handler pays for all the milk purchased. *United States* v. *Rock Royal Co-op., supra,* 307 U.S. at 566. Also, the Secretary has found that it is administratively impossible in most cases to determine what was the actual rate of payment to farmers for that part of the nonpool milk which the nonpool handler distributed in the marketing area, as distinguished from the price paid for that part which was disposed of elsewhere or for other than fluid purposes. See 18 F.R. 8449–8450.

In this connection, it is significant that the compensatory payments required under Order No. 27 do not increase the costs to Lehigh for the milk it sells in the area covered by that order. This is because Lehigh gets credit in its own pool (under Philadelphia Milk Marketing Order No. 61) for the compensatory

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payments made into the Order No. 27 Producer Settlement Fund (R. 97a).[25] Under the Philadelphia Milk Marketing Order, the milk it disposes of in the area of Order No. 27 is priced at Class I–A less the compensatory payment it makes under Order No. 27. In other words, by the combined operation of these two orders, Lehigh's total required minimum payment for its milk is in effect the Class I–A price under Order No. 27; the compensatory payment is canceled.[26] In these circumstances, Lehigh's complaint is, in substance, that it is not permitted to make the payments to its own farmers but make the payments to the fund for the benefit of the producers in the Order No. 27 pool. But this Court has ruled that a handler has no standing to complain of the disposition of moneys among the farmers. *United States* v. *Rock Royal, supra,* 307 U.S. at 561. Cf. *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 347.

4. *Compensatory payments are not part of "price" and therefore are not within the statutory requirement for uniform prices*

A compensatory payment is not paid to the farmer or seller of the milk and is not part of

[25] Suncrest is not subject to another milk marketing order and does not have this advantage. However, the compensatory payments are less costly to it than would be payments to the Producer Settlement Fund as a fully regulated pool plant.

[26] Under Order No. 27, Lehigh pays a compensatory payment amounting to the difference between Classes I and III. Under the Philadelphia order, Lehigh's milk sold in the New York-New Jersey area is priced at the Class I–A price *less* the compensatory payment. What is paid under Order No. 27 is subtracted under Order No. 61.

"price". As we have shown, it is paid to obviate the competitive disadvantage that pool handlers would otherwise suffer; to protect the orderly market condition which the Act is designed to achieve; to protect the price to the producers in the pool; and to stabilize the market and prevent destructive competition (18 F.R. 8448, 22 F.R. 4207–4208) (R. 752a–755a). It is to compensate the producers in the pool for the displacement of pool plant fluid milk sales, and to restore to the Producer Settlement Fund the sums by which it becomes depleted because of sales of fluid milk by nonpool plants in the pool area. These sales force pool plant fluid milk into surplus use (*i.e.*, milk products) and, in turn, lower the uniform price to pool producers for pool milk because the pool receipts represent a lesser quantity of milk as well as a lower classification of milk. See the discussion, *supra,* pp. 24–31.

As stated by Judge Learned Hand in his dissenting opinion in the *Kass* case (196 F. 2d at 799):

> The provisions in suit do not do that [*i.e.*, fix a minimum "price" for milk purchased from "producers"]; they fix no prices "for milk purchased from producers" at all, if by "price" is meant the money that eventually goes to producers in payment for their milk. The differential exacted from a "non-pool" handler is not the "price" of anything; moreover—for whatever that may be worth—it is collected "to accomplish the purposes" of assuring "minimum prices" for milk delivered by producers, § 8c(5)(C) * * *

Payments made to producers' cooperatives for marketwide services have been held to be necessary to effectuate the provisions of the marketing order, and have been held not to interfere with the price uniformity requirements of the Act. *Grant* v. *Benson,* 229 F. 2d 765 (C.A.D.C.), certiorari denied, 350 U.S. 1015. The payments there, as in this case, are not part of the uniform price designated in the statute, but are payments devoted to insuring that the policy of the Act and the order implementing it are carried out and that the uniform price to producers shall not be undermined.

5. *Compensatory payments insure the uniformity of price required by section 8c(5)(A)*

Lastly, when the compensatory payment provisions are related to the function they serve, it becomes clear—as we have already suggested—that in actuality they insure the price uniformity dictated by Section 8c(5)(A), rather than derogate from it.

As we have pointed out, without compensatory payments the Act's provisions for marketwide pooling of milk, for establishing orderly marketing conditions, and for maintaining a minimum price to producers would be frustrated. The testimony at the promulgation hearing was to the effect that "market pool orders with classified price plans cannot be continued without [compensatory payments]" (R. 392a–393a). The payments are designed to stabilize the relationship between handlers and producers of pool milk and handlers and producers of nonpool milk with respect

to sales in the marketing area. They make it impossible for a handler operating outside the marketing area to dispose of his surplus milk within the area in such a way as to impose the financial burden of the surplus on producers in the marketwide pool (R. 752a). Conversely, they restore to producers in the area of Order No. 27 the benefit of fluid sales displaced by the nonpool handlers' milk. No undue hardship rests on the nonpool handlers who, if they had not marketed the fluid milk in the Order No. 27 area, would normally have had to market it in their own area for a surplus use (*i.e.,* milk products) (R. 394a). It is the differential between the surplus use (Class III) and the Class I use which must be maintained to stabilize the market and prevent destructive competition for fluid milk sales.

In any event, pool producers carry the burden of reserve supply for the marketing area and should have the benefit of the value of the fluid milk sales in the area they regularly supply. It is essential to protect those farmers who are engaged in production of a supply of milk which is primarily produced for and always available for use when needed in the marketing area. Otherwise the money paid by consumers for fluid milk would in part be distributed among farmers delivering milk to plants which do not constitute a part of the regular and dependable supply of milk for the market. Consumers as well as producers would be hurt since the money intended for the pool producers to enable them to produce an adequate and dependable supply of pure milk for the particular marketing area would be lost through dis-

tribution to farmers only incidentally or intermittently engaged in supplying milk to this area 18 F.R. 8447; 22 F.R. 4207–4208 (R. 216a, 752a–755a).

In sum, the findings of the Secretary, on the basis of the extensive evidence with regard to the 1953 and 1957 amendments (R. 361a–696a; 697a–814a; 889–892), fully support the provisions for compensatory payments, not only as to their necessity to avoid frustration of the purposes of the Act and the provisions of the order, but also as to the propriety and effectiveness of the rate of payment for insuring the uniformity and level of prices required by the Act.

6. *The provisions do not violate Section 8c(5)(G)*

Petitioners' argument (Br. 47) that the compensatory payment provisions prohibit the entry of milk into the marketing area, in violation of Section 8c(5)(G) of the Act, *infra*, p. 62, is not properly before the Court as it was not presented in the administrative proceedings. *United States* v. *Ruzicka*, 329 U.S. 287, 292–294; *La Verne Co-Op. Citrus Assn.* v. *United States*, 143 F. 2d 415 (C.A. 9). In any event, it is without merit.

The compensatory payment provisions are applicable to nonpool handlers generally, regardless of *location*, and thus do not prohibit or even limit the marketing of milk "produced in any production area in the United States", within the meaning of Section 8c(5)(G). Milk from any production area may be in the pool or may be sold in the pool area as nonpool

milk. And, in fact, petitioners have continued and may continue to sell milk in this area.

Petitioners' complaint is, in effect, that the payments make it *unprofitable* for them to market milk in the New York-New Jersey area. Even if true, this does not mean that petitioners or any other non-pool handler are "prohibited" from marketing milk in the New York-New Jersey area. Leaving aside the fact that there is no prohibition in the order against milk produced outside the marketing area, compensatory payments are, after all, but one element of the handler's cost. Other elements include the amount paid the farmers who supply him, transportation expense, and overhead. Whether, in the particular case, milk can be profitably disposed of in the marketing area does not depend upon the compensatory payment alone. Rather, from a cost standpoint, the profit margin is controlled by the combined effect of all of these factors. In short, Order No. 27 is not *per se* the cause of petitioners' purported inability to sell milk in the marketing area at a profit.

Congress did not intend to forbid all protective measures which might, because of economic conditions in the market, result in some lessening of the amount of the milk which might have entered the marketing area in the absence of such protective measures. See dissenting opinion of Judge Learned Hand in the *Kass* case, 196 F. 2d 791, 800; *Bailey Farm Dairy Co.* v. *Anderson,* 157 F. 2d 87, 96–97 (C.A. 8), certiorari denied, 329 U.S. 788. In fact, Section 8c(5)(G) is carefully confined, in the case of milk itself, to *prohibitions* on marketing within the area of milk

produced elsewhere; there is no bar whatever, in the case of milk (as distinguished from milk products), to *limitation* of the marketing of outside milk. Since a "prohibition" involves the complete stoppage of all entry of milk from outside, and petitioners do not contend that the compensatory payment provisions completely preclude the entry of all such milk, it is clear that Section 8c(5)(G) has no application in this case.

Finally, it is worth noting that, since the nonpool handler has the option to join the pool and avoid the compensatory payments, it is not Order No. 27 but petitioners' own choice which brings the challenged provisions into operation. The order does not itself bar any milk from entering the area.

7. Section 8c(5)(D) does not preclude compensatory payment provisions

In its brief as *amicus curiae*, the State of Minnesota contends (p. 49) that Section 8c(5)(D), *infra*, p. 62 is the exclusive method provided by the Act for dealing with the competition of milk obtained from farmers who are not in the marketing pool. This contention was not advanced by petitioners in the administrative proceedings or in the courts below; and, indeed, is not urged by them in this Court. For these reasons, it is likewise not properly before the Court.

It might be noted, however, that there is no substance to the contention. Section 8c(5)(D) is, in terms, concerned only with "new producers", *i.e.*, farmers who are entering the pool. It permits (but does not require) the Secretary to place such pro-

ducers under a temporary handicap—the milk order may provide (although it need not) that for a period of two months payments to them for milk purchased by pool handlers shall be made at the price for the lowest use classification. Thus, the subsection has no relation to nonpool handlers (like petitioners) who elect not to be in the pool, or to dairy farmers who are neither in the pool nor seeking to enter it.

Moreover, there is a substantial reason why Congress deemed it necessary to authorize expressly the inclusion of a "new producer" provision. Section 8c(5)(B), *infra*, pp. 60–61, requires that all producers delivering milk to handlers in a pool be paid uniform prices. Thus, in the absence of the explicit exception in Section 8c(5)(D), it would not be possible for the Secretary to provide in a milk order, where he thinks it desirable, that producers entering the pool be treated differently for a short period of time.

On the other hand, there was no necessity for Congress to provide specifically for compensatory payments by nonpool handlers. As we have seen, nothing in Section 8c(5) prohibits the inclusion of provisions in a milk order for such payments should the Secretary find that they are required to effectuate the overall regulatory scheme. See *supra*, p. 34*ff*.

II

PETITIONERS ARE ESTOPPED TO ATTACK THE PARTIAL REGULATION WHICH THEY CHOSE VOLUNTARILY IN PREFERENCE TO FULL REGULATION

Full regulation of petitioners is permissible. See *Titusville Dairy Products Co.* v. *Brannan*, 176 F. 2d

332 (C.A. 3), certiorari denied, 338 U.S. 905, in which it was held that the Secretary had the authority to include under a milk order a plant all of whose milk was sold outside the marketing area. Under the 1957 amendments to Order No. 27, petitioner Suncrest had the option of choosing either pool plant or nonpool plant status, and elected the latter. Petitioner Lehigh would have had the same option had it not changed its operations so as not to qualify as a pool plant. See fr. 12, *supra*, p. 11.[27] Under the 1958 amendments, both petitioners would have automatically become pool plants had they not elected to be nonpool plants (R. 893, 895).

Having taken advantage of the option given to them by the order to accept the benefits of partial regulation in lieu of full regulation,[28] petitioners now attack the order for the purpose of avoiding the burdens of that partial regulation, without however accepting full regulation. This they may not do. In *Titusville Dairy Products Co.* v. *Brannan*, 176 F. 2d 332 (C.A. 3), *supra*, a handler similarly accepted the benefits of a marketing order and then endeavored to escape the consequences of its choice. The Third Circuit stated (176 F. 2d at 336):

> * * * In the first place, Titusville hardly is in a comfortable position to assert that it was not

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[27] It may be noted that, in the *Kass* case, there was no alternative of full regulation as a pool plant.

[28] For the disadvantages of full regulation, see 22 F.R. 4207–4208; *Lawson Milk Co.* v. *Benson*, 187 F. Supp. 66, 72 (N.D. Ohio).

> a "handler" within the definition of the Order, when Titusville voluntarily placed and kept itself in the category, gained whatever benefits accrued to being a member of that group, and until January 16, 1942, effectually retained the right to make shipments into the Area as and when it pleased.

In *Booth Fisheries* v. *Industrial Commission,* 271 U.S. 208, 211, this Court held that an employer—

> having elected to accept the provisions of the law, and such benefits and immunities as it gives, may not escape its burdens by asserting that it is unconstitutional. The election is a waiver and estops such complaint.

Accord: *Fahey* v. *Mallonee,* 332 U.S. 245, 255–256; *United States* v. *San Francisco,* 310 U.S. 16, 29. See also *Callanan Road Co.* v. *United States,* 345 U.S. 507, 513; *St. Louis Co.* v. *Prendergast Co.,* 260 U.S. 469; *Yarnell* v. *Hillsborough Packing Co.,* 70 F. 2d 435, 438 (C.A. 5). Cf. *United States* v. *Rock Royal Co-op., supra,* at p. 560, where the Court ruled that cooperatives were not entitled to complain of the benefits conferred on them by this Act.

III

PETITIONERS ARE SUBJECT TO FULL REGULATION AS POOL PLANTS, IF PARTIAL REGULATION FAILS

We have seen that, under Order No. 27, petitioners are subject to full regulation as pool plants or partial regulation as nonpool plants, and that the Secretary has full authority to bring petitioners into the pool. If the alternative of partial regulation should fail, it would follow that full regulation is applicable

and that petitioners must therefore comply with all of the provisions of the order pertaining to pool handlers.

In *Queensboro Farms Products* v. *Wickard,* 137 F. 2d 969 (C.A. 2), the court concluded that, if an exception to a classification is invalid, the classification minus the exception still stands and applies. It reasoned (137 F. 2d at 979):

> Appellant seems to contend that, as construed by the Secretary, this exception is unauthorized by the Act and that, therefore, the entire order is void. We cannot agree. For, if appellant's contention as to the exception were sound, the maximum result would be that the exception would be void. But the classification, minus the exception, as it applies to appellant—i.e., the form in which the product is delivered by the handler to the handler's customers—would then still stand; the Secretary's decision against appellant thus would still be valid, even assuming the exception to be wholly void. In other words, attacks on the validity of the exception can be of no avail to appellant and, therefore, need not here be considered. We can, then, ignore the exception as irrelevant. Cf. *City Bank Farmers Trust Co.* v. *Hoey,* 2 Cir., 125 F. 2d 577, 579.

Since Order No. 27 was promulgated under an Act which expressly provides for separability of provisions (7 U.S.C. 614), the provisions of the order implementing the statute should also be severable; and the invalidity of an alternative provision should not affect the validity of the remaining alternative of full regulation which, as pointed out above, is

authorized and valid under the Act. Cf. *Yarnell* v. *Hillsborough Packing Co.*, 70 F. 2d 435 (C.A. 5); *Yankton Sioux Tribe* v. *United States*, 272 U.S. 351.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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APPENDIX

The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601 *et seq.*, provides, in pertinent part:

SECTION 8c, 7 U.S.C. 608c. ORDERS REGULATING HANDLING OF COMMODITY.

* * * * *

(5) *Milk and its products; terms and conditions of orders.*

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided,* That except in

the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk, produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

* * * * *

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

* * * * *

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

* * * * *

(7) *Terms common to all orders.*

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

* * * * *

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)–(7) of this section and necessary to effectuate the other provisions of such order.

* * * * *

(11) *Regional application.*

(A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds

that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of sections 601–604, 607, 608, 608a, 608b, 608c, 608d, 608e–1, 608f–612, 613, 614–619, 620, 623, and 624 of this title.

* * * * *

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

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